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CASE NOTES

Attorneys — Power of a Court To Establish a Scale for Attorneys' Fees. —The justices of the New York Appellate Division, First Department, adopted a special rule for attorneys within the First Department, establishing a scale of fees for lawyers' services in personal injury suits and wrongful death actions. It also required the filing of a closing statement with the court, and provided for the award of additional compensation in the discretion of the court. Plaintiffs, who were themselves attorneys, contested the power of the court to enact such a rule. Plaintiffs' motion for summary judgment, *held,* granted. In the absence of statutory or constitutional authority, a court is without power to enact or enforce a rule establishing a scale for attorneys' fees. *Gair v. Peck,* 6 Misc. 2d 739, 165 N.Y.S.2d 247 (Sup. Ct. 1957).

The attorney's contingent fee has been censured for years because of the excesses to which it has so often been carried.[1] In New York, the measure of an attorney's compensation has been the subject of agreement, express or implied, between the attorney and client since statutes and regulations controlling fees were discarded in 1848.[2] Prior to 1848, and as early as 1658, when Governor Stuyvesant, with "some legislative or executive authority,"[3] created New York's first tariff of attorneys' fees, an attorney's compensation had been prescribed by state regulation. Under the English system, the same control was generally exercised by the judiciary.[4] Thus, the legislature and not the judiciary controlled the fees of lawyers in New York from the beginning.[5] However, the Code of Civil Procedure in 1876 incorporated the provision that "the compensation of an attorney or counsellor is governed by agreement, express or implied, which is not restrained by law."[6] This clause was made a part of the present Judiciary Law.[7]

Concerning the *power* of the appellate division to enact and enforce a rule setting a scale for contingent fees,[8] the court could find no New York case in

1. Burling v. King, 46 How. Pr. 452 (N.Y. Sup. Ct., Gen. T. 1874); Buckley v. Surface Transp. Corp., 277 App. Div. 224, 98 N.Y.S.2d 576 (1st Dep't 1950); Ruiz v. Sistman, 1 A.D.2d 806, 149 N.Y.S.2d 183 (1st Dep't 1956). For general survey of the problem in New York see Comment, Lawyer's Tightrope—Use and Abuse of Fees, 41 Cornell L.Q. 683 (1956).

2. N.Y. Sess. Laws 1848, c. 379, § 258.

3. 1 Chester, Courts and Lawyers of New York 143 (1925).

4. Ibid. See also People ex. rel. Karlin v. Culkin, 248 N.Y. 465, 476, 162 N.E. 487, 491 (1928).

5. With the exception that counselors were limited only with regard to contingent fees, there being no general restraint upon their contracts.

6. N.Y. Code Civ. Proc. § 66 (1876).

7. "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. . . ." N.Y. Judiciary Law § 474.

8. It was agreed that the necessity, fairness or desirability of the rule was not to be discussed. The new rule 4 is entitled "Contingent Fees in Claims and Actions for Personal Injury and Wrongful Death" and generally it established a scale of fees to be strictly followed except where the court, upon review of the particular circumstances, allows deviation. It provides that the receipt or retention of fees in excess of the schedule shall constitute the exaction of unconscionable fees in violation of Canons 12 and 13 unless allowed by the court

point, but noted and discussed the opinions expressed in two other jurisdictions. In *Shannon v. Cross*,[9] the Supreme Court of Michigan declared invalid a circuit court's rule requiring that, where a plaintiff could not produce security for costs, his attorney should file an affidavit to the effect that he had not bargained for a division of or share in the judgment sought. It was held that the rule inhibiting the right of contract of the parties, was more a substantive than a procedural enactment, and was a usurpation by the judiciary of a legislative function. In *Thatcher v. Industrial Comm'n*,[10] the Supreme Court of Utah upheld the right of the legislature to grant the industrial commission the authority to fix attorneys' fees in compensation proceedings, but in its opinion clearly pronounced the view that no correlative power existed concurrently in the judiciary. The present court took note of the fact that statutes operative in those jurisdictions were verbatim with the corresponding provisions of section 474 of the New York Judiciary Law,[11] the basis of the plaintiffs' claim in the present case.

The basic contention of the defendant justices was that the adoption and enforcement of the new rule was merely a proper exercise of their powers and disciplinary duties as defined and granted by sections 83[12] and 90(2)[13] of the Judiciary Law. However, Justice Stevens, in his opinion, rebutted this contention by noting that section 83 expressly limits the special rules which the appellate division in any one department may adopt to those not inconsistent with any statute or rule of practice. Since rule 4 is inconsistent with the obvious intent of the legislature in section 474, authorizing attorneys to contract for their fees, unrestrained by law, the court argued that the power to enact and enforce rule 4 is not granted by section 83.

Furthermore, the court, recognizing the distinction between disciplinary powers and those prescriptive or regulatory, found that the only power over attorneys granted the appellate division under section 90(2) was disciplinary, while the evident function of the new rule was to prescribe or regulate in advance. The

in its discretion. In all cases the attorney must file a closing statement with the clerk of the appellate division. Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the First Judicial Department, Rule 4.

9. 245 Mich. 220, 222 N.W. 168 (1928).

10. 115 Utah 568, 207 P.2d 178 (1949).

11. See note 7 supra.

12. "A majority of the justices of the appellate division in the four departments, by joint order of the four presiding justices or justices presiding, shall have the power, from time to time, to adopt, amend or rescind any rule of civil practice, not inconsistent with any statute; and a majority of the justices of the appellate division in each department, by order of such majority, shall have power, from time to time, to adopt, amend or rescind any special rule for such department not inconsistent with any statute or rule of civil practice." N.Y. Judiciary Law § 83.

13. "The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud . . . or any conduct prejudicial to the administration of justice. . . ." N.Y. Judiciary Law § 90(2).

New York Court of Appeals had said in *Matter of Fitzsimons*,[14] that whether fraud or undue advantage has been perpetrated can be established in New York only after ". . . the question has been fully and fairly investigated. . . . The statute [now Judiciary Law section 474] conferred upon the parties the right to make the contract, and conferred upon the court no authority to make it for them." Obviously then, the present court argued, the disciplinary power under section 90(2) is capable of exercise only *ex post facto*, not before the unconscionable fee is charged, and that in the absence of fraud or other professional misconduct, the rights of an attorney to contract for his fee are not to be governed in advance by the powers of the appellate division under section 90(2), but by section 474.

Defendants noted that ". . . the sole question here is whether the Court may advise the Bar in advance of its standards and relieve lawyers of the threat of impairment of their professional standing by an *ex post facto* determination,"[15] and relied on *Erie County Water Authority v. Western New York Water Co.*,[16] where the New York Court of Appeals stated that the appellate division ". . . has exclusive jurisdiction to say what constitutes professional misconduct on their [lawyers'] part."

The present court attempted to distinguish this by indicating that in the *Erie County* case the misconduct had already occurred, and that the Court of Appeals merely reaffirmed a long standing position on the authority of the appellate division to *discipline*. The court would not agree with the contention of the defendant justices that their power to discipline included the power to set, in advance, standards of professional conduct regarding contingent fees,[17] notwithstanding the fact that the court has heretofore established in advance such standards in other respects.[18]

At first blush the court may seem to have fully and fairly decided the issue of the case. There are, however, further points, which, when considered in the historical context from which the question of judicial power to regulate attorneys' fees has arisen, would lead to a contrary judgment. It has been suggested[19] that the 1848 statute,[20] the prototype of section 474 of the Judiciary Law, may be

14. 174 N.Y. 15, 23-24, 66 N.E. 554, 557 (1903). A similar view was adopted by the court in Morehouse v. Brooklyn Heights R.R., 185 N.Y. 520, 526, 78 N.E. 179, 181 (1906), where the court said that ". . . the mere fact that the attorney under the agreement was to receive one-half does not render it unconscionable, unless it appears from the evidence that it was induced by fraud, or, in view of the nature of the claim, that the compensation provided for was so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over his client."

15. Memorandum on Behalf of the Defendants, prepared by the Attorney General of the State of N.Y., p. 12.

16. 304 N.Y. 342, 346, 107 N.E.2d 479, 481 (1952).

17. That is, apart from the "reasonable standard" of Canons 12 and 13 of the Canons of Professional Ethics.

18. See, e.g., Special Rules Regulating The Conduct of Attorneys and Counselors-at-Law in the First Judicial Department, Rule 2.

19. 41 Cornell L.Q. 692 (1956).

20. Note 2 supra.

given a construction quite different from that upon which the present decision is to some degree based. If the legislative intention was not to create or sanction an unfettered right of contract in attorneys generally, but solely to remove the state legislature from the business of regulating the practices of officers of the court,[21] then it could be maintained that section 474 merely restored to the courts and the judiciary in New York the strict control over attorneys enjoyed in England, where from early days lawyers' compensation had been a matter of court regulation.[22] If so, then the force of the provision that attorneys' contracts are not to be restrained by law is to be directed at statutory law, legislative enactment, and not court regulations. Viewed in this way, there is no inconsistency between rule 4 and section 474; and the rule may be validated as a proper exercise of the rule-making power under section 83. Furthermore, validity under section 90(2) would appear to require only that rule 4 operate within a sphere of activity in which the court had the power to discipline. Since it is not disputed that the court may discipline in a particular case for exaction of unconscionable fees, the authority for the rule may also lie in section 90(2).

Defendants maintained the right to advise the bar in advance of the standards which shall in a particular case determine the question of professional misconduct. Such advance notice has been given the bar in other matters with no discernible conflict resulting.[23] Thus, just as an attorney is limited in regard to soliciting clients,[24] and since the office is generally burdened with conditions,[25] it seems consistent to allow control over compensation. Moreover, under the new

21. See First Report of the Commissioners on Practice and Pleadings—Code of Procedure 204-05 (1848), quoted in 41 Cornell L.Q. 691 (1956) where it is reported: "We cannot perceive the right of the state to . . . fix the compensation which one [citizen] . . . shall receive from the other. . . . [T]he only rightful supervision that the state may have over [attorneys] . . . is to see that he does not abuse his license." There do remain, however, certain statutory limitations upon attorneys' right to contract for fees, but these in almost every instance refer the determination of the fee to the discretion of the interested court. For consideration of the argument that these statutes constitute specific exceptions to section 474 of the Judiciary Law and are thus the sole exceptions under the principle "expressio unius est exclusio alterius," see Plaintiff's Memorandum in Support of Motion for Summary Judgment.

22. Merritt v. Lambert, 10 Paige 352, 356-57 (N.Y. Chancery 1843). In 1 Chester, Courts and Lawyers of New York 143 (1925), it is noted that "in England the fees of attorneys and other officers of the court have generally been regulated by the court, and not by any public act. In New York, however, the fees of public officers has been a matter of public regulation from a very early period. Ten or twelve years after the restoration of the province to the English, they were regulated by an ordinance of the governor, and afterwards by acts of the General Assembly; and there is every reason to believe that the practice, especially as respects the fees of attorneys and officers of the court, was derived from the Dutch." See also, the Order of Common Pleas given in 1654, directing an inquiry into the matter of fees and the establishment of a table of just fees, People ex. rel. Karlin v. Culkin, 248 N.Y. 465, 476, 162 N.E. 487, 491 (1928).

23. See note 18 supra.

24. It would seem that a rule regulating the amount of income derived from legal services is of no more substantive a character than is a rule regulating the solicitation of clients for those services.

25. Matter of Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917).

rule, there is provision for a reasonable fee in every case, since that same judicial discretion, which has heretofore decided the conscionableness of fees after their receipt, now tempers the rigidity of the scale in rule 4 by providing for a fee higher than the scale upon application to the court and proof of the reasonableness of the higher fee.

Even though on appeal the present case may be otherwise decided, the necessity and desirability of such a rule would seem to require fuller consideration and investigation. Those investigations previously made failed to elicit facts warranting such a rule or legislation of similar effect.[26] To adopt a middle course, requiring attorneys in personal injury suits and wrongful death actions to file only closing statements would, at the very least, provide the court with more reliable data upon which to determine the need for such a rule. The prescriptive scale could profitably be held in abeyance until the results achieved through those sections of rule 4 requiring closing statements could be analyzed.

Federal Civil Procedure — Corporation Aligned as Defendant in Determining Diversity of Citizenship in Stockholder's Derivative Suit.— Plaintiff, a citizen of New York, instituted a stockholder's derivative suit in the United States District Court for the Southern District of California. Defendant directors were citizens of California. The corporation of which plaintiff was a stockholder and a corporation controlled by one of the individual defendants, both incorporated in Delaware, were also named as defendants. The district court, after a preliminary hearing, realigned the plaintiff's corporation as a party plaintiff and dismissed for want of diversity of citizenship. The court of appeals affirmed. On review, the United States Supreme Court, *held,* four justices dissenting, reversed. In a stockholder's derivative action the corporation is aligned as a party defendant where the corporate management has manifested antagonism to the stockholder, and such antagonism is determined from the pleadings. *Smith v. Sperling,* 354 U.S. 91 (1957).

The usual forum for stockholder's derivative suits is the state courts,[1] with the possibility of trial in the federal courts when diversity of citizenship exists.[2] Such diversity must be complete so that no party on one side of the controversy is from the same state as any party on the other side.[3] Thus the question of whether the corporation is to be aligned as a party plaintiff or defendant is vital when federal jurisdiction is in issue, and the corporation is a citizen of the same state as one or more of the other parties.

As far back as 1855 it was held by the Supreme Court in *Dodge v. Woolsey*[4] that unless the plaintiff's suit be a contrivance to give the court jurisdiction, the federal court must take cognizance of the action and that defendants have the

26. 41 Cornell L.Q. 683 (1956).

1. See Hawes v. City of Oakland, 104 U.S. 450, 452 (1881).

2. "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States. . . ." U.S. Const. art. III, § 2, cl. 1.

3. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) *267 (1806).

4. 59 U.S. (18 How.) 331, 346 (1855).

burden of proving such contrivance.[5] In 1881 the Supreme Court in *Hawes v. City of Oakland*[6] added the requirement that the plaintiff stockholder verify by oath that the action was not a collusive one with respect to the court's jurisdiction.[7] The collusion usually took the form of an agreement between the management of a corporation and a stockholder whereby the latter would institute suit in the name of the corporation so as to obtain the requisite diversity of citizenship.[8] The arrangement was given an aura of legitimacy by a sham refusal on the part of the management to institute the suit at the behest of the stockholder. The stockholder would join the corporation and the corporate management as defendants, along with the third party who was the real defendant in interest. The Supreme Court's requirement was designed to insure that the alignment of parties, as presented in the stockholder's bill, reflected a legitimate controversy between the stockholder and those running his corporation. A further significant point is that the Court looked only to the nature of the charges contained in the pleadings in determining whether a true controversy existed. It was the failure of plaintiff to show in the pleadings a true controversy between himself and the corporate management that caused dismissal of the suit.

In 1905, in *Doctor v. Harrington*,[9] the first case dealing with the alignment of parties for jurisdictional purposes, the plaintiff stockholders, citizens of New Jersey, had alleged that the corporation and its board of directors were under the absolute control of the defendant Harrington, a citizen of New York, who had used this control to defraud the corporation. Since the latter was incorporated in New York, it too was joined as a party defendant. The Supreme Court upheld the alignment, holding that "the ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arises, and the other conditions of jurisdiction exist, it can be litigated in a Federal Court."[10] The charges of fraud in the bill had been denied in the answer. Unlike the trial court in the instant case, the trial court there did not then conduct a preliminary investigation to determine whether the charges of fraud were justified. Rather, the existence of antagonism was determined by the allegations in the pleadings. The Court stated that "the case at bar is brought within the doctrine of those cases [establishing the right of a

5. At this time, the federal courts did not have the power to order realignment of the parties and only the pleadings were examined in determining whether diversity jurisdiction existed. This was remedied by the Act of March 3, 1875, 18 Stat. 470, 472, which authorized the federal courts to dismiss or remand to the court from whence it was removed any case involving a controversy not within the court's jurisdiction or one in which the parties were collusively joined.

6. 104 U.S. 450, 461 (1881).

7. The rule as given was codified at the same term in Equity Rule 94 and is now incorporated in Fed. R. Civ. P. 23(b).

8. 104 U.S. at 452.

9. 196 U.S. 579 (1905).

10. Id. at 587.

stockholder to sue derivatively in the federal courts] by the allegations of the bill."[11]

In 1908, in *Venner v. Great Northern Ry.*,[12] the complaint alleged joint fraudulent conduct on the part of the corporation and the other defendant, its president, with whom it jointly resisted the charge. The resistance of the corporation to the plaintiff's allegations was, in reality, no more than the resistance of the president, who controlled its affairs. The Court, however, upheld the alignment of the corporation as a party defendant. Again, it was the allegations of the pleadings that determined the issue of antagonism, and not a preliminary inquiry into their merits.

The Court in the present case was concerned primarily with the questions of when a corporation is to be considered in antagonistic hands and how such antagonism is to be determined. Is it in antagonistic hands only when it is shown that those controlling it are guilty of fraud, breach of trust or some similar conduct, or, on the other hand, whenever the management defends any course of conduct attacked by the stockholder as detrimental to the corporation? If the first proposition were the criterion, then, of necessity, a preliminary inquiry must be conducted to evaluate the validity of the stockholder's charges so as to determine whether the requirements for antagonism have been met. However, as pointed out by the Court, this preliminary inquiry would be governed by federal rules, since it involves a determination of federal jurisdiction. If, as a result of this preliminary inquiry, the federal court accepted jurisdiction, the entire procedure would have to be repeated again at the trial of the merits of the stockholder's suit. The trial would this time be governed by the law of the state in which the action arose.[13] If the second proposition were the criterion, then the court need do no more than examine the pleadings and if the plaintiff stockholder's allegations are denied by the corporate management, antagonism is manifest.

The majority opinion in the present case stated that ". . . the proper course is not to try out the issues presented by the charges of wrongdoing but to determine the issue of antagonism on the face of the pleadings and by the nature of the controversy. The bill and answer normally determine whether the management is antagonistic to the stockholder . . . ."[14] The Court argued that "to stop and try the charge of wrongdoing is to delve into the merits."[15] This would in the Court's opinion be ". . . a time-consuming, wasteful exertion of energy on a preliminary issue in the case."[16] In light of the prior holdings of the Supreme Court, this view would appear to have greater merit than that proposed by the minority.

The minority would adopt the rule advanced by the trial court giving antagonism a meaning related to the first proposition set forth above. The trial court stated that "if the corporation has suffered actionable wrong and is 'in antago-

11. Id. at 588.
12. 209 U.S. 24 (1908).
13. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
14. 354 U.S. at 96.
15. Id. at 95.
16. Ibid.

nistic hands'—i.e. so dominated that it is incapacitated to act in keeping with its own financial interests . . . a federal court should not . . . align the corporation with the plaintiff-stockholder in determining whether diversity jurisdiction exists."[17]

It should be noted that under the procedural requirements for maintaining a stockholder's derivative suit in the federal courts,[18] the plaintiff must allege in his pleadings either that a demand was made on the corporate management to take action on his complaint and the demand was refused, or that such a demand would have been futile. Since these allegations are always either denied or explained away by the defendants, antagonism as interpreted by the majority opinion immediately arises. The corporation would, it would seem, be aligned as a party defendant in every case.

If antagonism is to be the criterion for determining diversity jurisdiction, the simplicity of the test advanced by the Court renders it more acceptable and workable than that proposed by the minority opinion. However, the practical effect of the decision is to give plaintiff stockholders in a derivative suit a choice of suing either in the state or federal courts. Since the corporation will in effect always be aligned as defendant, if suit in the federal courts appears more favorable, stockholders can obtain complete diversity by selecting from their number a stockholder whose state citizenship differs from that of all the defendants.

Since state corporate law is applicable in stockholder's derivative suits, it would seem more desirable to restrict such actions to the state courts as much as possible. This could better be accomplished by aligning the corporation as plaintiff in every case. Since one or more members of the board of directors are usually required by statute to be citizens of the state of incorporation, no diversity would obtain, at least where such director or directors are defendants in the action. Moreover, such an alignment would be consistent with the basic theory of stockholder's derivative suits, namely, that the action is brought for the benefit of the corporation. Such a change, however, would now seem to require congressional action.

Labor Relations — Federal Pre-Emption of State Courts' Right to Award Damages for Unfair Labor Practice.—Plaintiff, a union member, was involved in a controversy within his local concerning union funds and officers. Plaintiff opposed the group in control of the local and, in retaliation, the union prevented plaintiff from securing employment for almost a year. Plaintiff was eventually compelled to find less remunerative work in another industry. He filed a complaint with the National Labor Relations Board, but before a hearing could be had, withdrew his charge and sued the defendant union in a state court for the common-law tort of interference with employment. The jury awarded him damages, and the court denied the defendant's motion for judgment *n.o.v.* Upon appeal to the Supreme Court of Washington, *held,* three justices dissenting, affirmed. The National Labor Relations Board does not have exclusive jurisdiction over unfair labor practices, and a state court has jurisdiction to award

17. Smith v. Sperling, 117 F. Supp. 781, 801 (S.D. Cal. 1953).

18. Fed. R. Civ. P. 23(b).

damages where the unfair labor practice is also a common-law tort. *Selles v. Teamsters Union, AFL,* — Wash. 2d —, 314 P.2d 456 (1957).

Under the federal pre-emption doctrine, whenever Congress legislates in a field proper to it under the Constitution, that legislation, by virtue of the supremacy clause,[1] supersedes all conflicting state law whether statutory or decisional.[2] The effect of a specific federal statute upon state jurisdiction will vary with the intent of Congress, but the effect may be either to take all jurisdiction from the states, give all jurisdiction to the states, or share concurrent jurisdiction with them.[3] In areas of concurrent jurisdiction, federal law, if conflicting with state law, will prevail.[4] However, a real problem arises when an attempt is made to categorize legislation in one of the three classes.[5]

The National Labor Relations Board is empowered "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."[6] The Supreme Court has not found here any manifestation of congressional intent to pre-empt the field but, in fact, has found that there is a wide area open to state regulation.[7] The line to be drawn has been traced by scores of cases, but it can still be safely stated that each case must be decided on its own facts, for "the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds."[8]

It is clear that a state may not enjoin that which is permitted by the federal statute,[9] and unless exceptional circumstances can be shown, it may not enjoin that which is prohibited by it.[10] The compelling circumstances warranting exceptions have involved the use of state police power to enjoin violence resulting from union activity,[11] or types of peaceful picketing which contravene state public policy.[12]

The states have the power to act in that part of the labor relations field where the NLRB is without power under the Act, and which, therefore, is either governable by the state or not at all.[13] It has, however, been established that

1. U.S. Const. art. VI, cl. 2.

2. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). For application in labor relations see Garner v. Teamsters Union, AFL, 346 U.S. 485 (1953).

3. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 155 (1941).

4. U.S. Const. art. VI, cl. 2; Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942).

5. For guideposts in solving the jurisdictional question, see Atchison, T. & S.F. Ry. v. Chicago, 136 F. Supp. 476, 480 (N.D. Ill. 1955).

6. 29 U.S.C.A. § 160(a) (1956).

7. Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

8. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955).

9. Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945).

10. Garner v. Teamsters Union, AFL, 346 U.S. 485 (1953).

11. Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

12. Hughes v. Superior Ct., 339 U.S. 460 (1950) (issue of pre-emption not raised); cf. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

13. United Automobile Workers, AFL v. Wisconsin Employment Relations Bd., 336 U.S. 245, 254 (1949).

when the NLRB has power but declines jurisdiction on the ground that regulation would not be in furtherance of the purposes of the Act, a state may not substitute its own regulation.[14] And recently it has been held that if a case does not come within the self-imposed monetary limits of the NLRB's jurisdiction, a state may not automatically take jurisdiction.[15]

Supreme Court decisions denying state jurisdiction in labor disputes have been based largely on the rationale that the matter was within the purview of the NLRA and actual or potential conflict existed between federal and state regulation in the field. Thus the Court has denied the states the right to determine union representation questions in all industries over which the NLRB has jurisdiction,[16] and had denied the power of a state to interfere with a right to strike protected by federal statute,[17] or to a demand that a strike vote precede an actual strike.[18]

In *United Constr. Workers v. Laburnum Constr. Corp.*,[19] union agents demanded that the employees of the company join a union. Upon refusal of the company and many of its employees, the union threatened the company with violence to such a degree that the company was compelled to abandon its projects. The Virginia state court awarded damages,[20] and the United States Supreme Court affirmed,[21] reasoning that since Congress had not prescribed a procedure for dealing with the consequences of tortious conduct, ". . . there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated"[22] from state jurisdiction.

In the present case the Washington court relied heavily on the doctrine of the *Laburnum* case. The majority decided that it was an unfair labor practice under the NLRA for the union to cause an employer to discriminate against an employee in regard to hire, and to interfere with the plaintiff's right to engage in concerted activities for mutual aid or protection.[23] This done, the real issue was framed: "Does the National Labor Relations Board have exclusive jurisdiction over matters involving conduct which constitutes an unfair labor practice under the Act, so as to preclude a state court from hearing and determining a common-law tort action for damages resulting from interference with employment based on such conduct?"[24] The court concluded that it did not.

The defendant union had argued that *Garner v. Teamsters Union, AFL*[25]

14. Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947).
15. Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).
16. La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949).
17. Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951).
18. United Automobile Workers, CIO v. O'Brien, 339 U.S. 454 (1950).
19. 347 U.S. 656 (1954).
20. United Constr. Workers v. Laburnum Constr. Corp., 194 Va. 872, 75 S.E.2d 694 (1953).
21. 347 U.S. 656 (1954).
22. Id. at 665.
23. 29 U.S.C.A. §§ 157-58 (1956).
24. ___ Wash. 2d ___, ___, 314 P.2d 456, 459 (1957).
25. 346 U.S. 485 (1953).

controlled the present case. In the *Garner* case the union peacefully picketed an interstate trucking firm to coerce the employees to join their union. The firm obtained an injunction from a state court enjoining the picketing, but this was promptly reversed by the state supreme court. Upon appeal, the United States Supreme Court affirmed, declaring that "Congress has taken in hand this particular type of controversy . . ." and has given exclusive jurisdiction to the NLRB, evidently considering that ". . . centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules. . . ."[26]

The instant court found numerous reasons to distinguish the present case from the *Garner* case, and to follow, instead, the authority of the *Laburnum* case. In the *Garner* case Congress had provided a federal administrative remedy with which the state injunctive procedure conflicted. In the *Laburnum* case Congress had provided no substitute for the traditional state court procedure for collecting damages resulting from tortious conduct. The *Laburnum* case was quoted: "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [the *Garner* case] recognized that the Act excluded conflicting state procedure to the same end. . . . The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived."[27] The present court found no conflict and asserted jurisdiction. The NLRB could issue a cease and desist order and might order reinstatement with or without back pay.[28] The state court pointed out that it was not issuing a cease and desist order nor ordering reinstatement and back pay, but was only ordering damages for the common-law tort.

The dissent considered itself bound by *Mahoney v. Sailors' Union*,[29] where this same court had held that the NLRB had exclusive jurisdiction in an action by a former member against a union to grant him reinstatement in the union and damages for earnings lost by reason of the union's unfair labor practice. The majority scarcely considered this argument; it considered that a distinction was readily apparent since in the present case only damages were sought while in the *Mahoney* case reinstatement was also asked. The majority reasoned that for a state court to order reinstatement would be to order a union to cease committing an unfair labor practice and that such an action would bring the state into collision with the NLRB.

The decision brings into focus the confusion existing in the state and federal courts concerning jurisdiction where the act complained of is at once an unfair labor practice and a common-law tort. The basic doctrine crystallized in the *Garner* case is that a state may not afford relief for conduct subject to regulation by the NLRB. "[W]hen two separate remedies are brought to bear on the same activity, conflict is imminent."[30] The *Laburnum* case cut into this

26. Id. at 488, 490.
27. 347 U.S. at 665.
28. 29 U.S.C.A. § 160(c) (1956).
29. 43 Wash. 2d 874, 264 P.2d 1095 (1953).
30. 346 U.S. at 498-99.

sweeping rule by allowing an injured party to recover damages for a common-law tort where the NLRB offered no such remedy. The instant court relied on this exception to allow recovery for the tortious conduct of the union. That the *Laburnum* case is in point is open to question.

In the *Laburnum* case the injured party was the company. It had been so intimidated by the union that it was forced to give up several projects, and it sued the union for lost profits. There is nothing in the NLRA which provides a remedy in such a situation; thus, the state court exercised its traditional common-law jurisdiction. "If the state court is denied jurisdiction in this case it will mean that where federal preventive administrative procedures are impotent or inadequate, the offenders . . . may destroy property without liability for the damage done."[31] In the present case the injured party was a union member suing for the damage caused by an unfair labor practice. His damages were the wages lost during the period of discrimination against him. There is little question but that the act covers such a case and affords a remedy. It has the power ". . . to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [act]."[32] Thus it seems that he had a completely adequate remedy with the NLRB, and the *Laburnum* exception to the *Garner* rule should not apply to him.

The case is another in the long line of cases involving the NLRA where the state courts have claimed concurrent jurisdiction[33] and federal courts have given sole jurisdiction to the Board.[34] Each claims jurisdiction, and it is difficult to determine what view the Supreme Court will take. The states argue that since Congress has not indicated a clear intent to pre-empt the field, they should retain jurisdiction where it would not depend on the context of labor relations as such.[35] For example, the NLRB affords a remedy for violence to union-organizers,[36] but despite the fact that this is an unfair labor practice the state courts contend that they should be free to award damages for assault and battery. In their view the unlawfulness of the assault is not determined by, and is not dependent on the fact that the violence was an unfair labor practice. If the existence of a labor dispute is irrelevant, the states argue for jurisdiction.

The federal courts contend that the *Garner* case precludes a duplicity of remedies. If the NLRB affords an adequate remedy, the states are prevented from offering their remedy. The Board has exclusive jurisdiction to decide whether any unfair labor practice has been committed and to determine how

31. 347 U.S. at 659.

32. 29 U.S.C.A. § 160(c) (1956). See Born v. Laube, 213 F.2d 407 (9th Cir. 1954).

33. Barile v. Fisher, 197 Misc. 493, 94 N.Y.S.2d 346 (Sup. Ct. 1949); Wortex Mills v. Textile Workers Union, CIO, 380 Pa. 3, 109 A.2d 815 (1954). Baun v. Lumber and Sawmill Workers Union, AFL, 46 Wash. 2d 275, 284 P.2d 275 (1955).

34. Anson v. Hiram Walker & Sons, 222 F.2d 100 (7th Cir. 1955); Born v. Laube, 213 F.2d 407 (9th Cir. 1954); Amazon Cotton Mill Co. v. Textile Workers' Union, 167 F.2d 183 (4th Cir. 1948).

35. The rationale of this position is presented in Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1321 (1954).

36. NLRB v. Weirton Steel Co., 135 F.2d 494 (3d Cir. 1943).

they shall be corrected.[37] "[W]here the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."[38]

Recent decisions of the Supreme Court have leaned toward federal pre-emption. In *Guss v. Utah Labor Relations Bd.*,[39] the Court held that even where the NLRB had refused to act, the state could not assert jurisdiction without an express cession from the Board. Thus if the Board refused to act or to cede jurisdiction, we have a "no-man's land" where there can be a wrong without a remedy.[40]

The state's power to award damages for an act which is both an unfair labor practice and a common-law tort was considered in *San Diego Bldg. Trades Council v. Garmon*[41] but the Court refused to rule on that issue. There, the California Supreme Court had affirmed a superior court injunction and damage award against a union which had sought by peaceful picketing to coerce the employer into a union shop agreement. The Supreme Court reversed on the ground that the NLRB had exclusive jurisdiction, but it refused to rule on the contention that damages should be sustained under the *Laburnum* rule, because the state opinion was ambiguous as to whether local or federal law had been applied in awarding damages for the tort. The Court recognized that *Laburnum* had allowed a state to grant compensatory relief under local tort law for *violent* conduct but said: "We cannot know that the California court would have interpreted its own state law to allow an award of damages in this different situation."[42]

Just what the Court meant by this is open to speculation. Since it recognized that the conduct complained of was peaceful picketing, perhaps it intended to serve notice that it might not restrict the *Laburnum* case to its facts. Although the *Laburnum* case did involve violence, its broad language has been construed to support the award of damages for any infraction of state tort law. If *San Diego Bldg. Trades Council v. Garmon* is, in fact, a hint that the Court will allow state compensatory relief for nonviolent conduct, just how far will this be carried? To allow a state to award damages in situations as in the instant case (where compensation may be justified outside the context of labor relations) might not be objectionable; but if a state be permitted to take jurisdiction merely because it offers a different remedy while an adequate remedy exists in the NLRB, it could use the damage award as an effective club to enforce a local labor policy in a federally pre-empted area, and thus achieve by way of the back door that on which the *Garner* case has closed the front door.

37. United Brick & Clay Workers v. Robinson Clay Product Co., 64 F. Supp. 872 (N.D. Ohio 1946).

38. Weber v. Anheuser-Busch Inc., 348 U.S. 468, 481 (1954).

39. 353 U.S. 1 (1957).

40. The Court reached the same conclusion in Amalgamated Meat Cutters, AFL v. Fairlawn Meats, Inc., 353 U.S. 20 (1957).

41. 353 U.S. 26 (1957).

42. Id. at 29.

Libel and Slander — Republication as a New Cause of Action Against Original Author.—An allegedly defamatory letter was written by the defendants to plaintiff's employer on February 23, 1955. It was republished by the employer on March 23, 1956, to a promotion board convened to consider plaintiff's record. Plaintiff instituted this action for libel on June 8, 1956. Defendants maintained that the cause of action accrued on the date of the original publication, and that it was, therefore, barred by the one year statute of limitations. The trial court sustained the defendants' plea. On appeal, the Supreme Court of Appeals of Virginia, *held*, two justices dissenting, reversed. A republication of defamatory matter by third persons gives the injured party a new and separate cause of action against the original author, provided such republication is the natural and probable consequence of the author's act or was actually or impliedly authorized or directed by him. *Weaver v. Beneficial Finance Co.*, 199 Va. 196, 98 S.E.2d 687 (1957).

Since defamation is essentially injury to reputation, and reputation is the opinion held of a man in his community, no cause of action is had unless the false statement is brought to the attention of a third person.[1] Just as a man's reputation may suffer from the original publication by the author to another, so a republication or repetition of the defamatory statement adds to its notoriety, and may therefore add to the damage already caused by the initial defamation. An injured party has a cause of action against each person republishing or repeating the defamatory statement as though he were the original author of it.[2] If the author himself republished the libel or slander, he would be liable for the republication as well as for the original publication.[3] In addition, the author of the defamation is liable for any republication or repetition by a third party which is the natural and probable consequence of his act or was actually or presumptively authorized or directed by him,[4] but not for any republication which is the independent and unauthorized act of another.[5]

Both the majority and dissent in the case at bar acknowledged that the author was liable for the republication. But the majority held that the republication constituted a new cause of action against the libeler, while the dissent argued that republication was relevant only to the quantum of damages.[6]

1. Seelman, Libel and Slander in New York, para. 121 (1933).

2. Id. paras. 128, 141-42.

3. Hartmann v. Time, Inc., 64 F. Supp. 671 (E.D. Pa. 1946); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W.2d 246 (1942); Hall v. Frankel, 183 Wis. 247, 197 N.W. 820 (1924); 53 C.J.S., Libel and Slander § 83 (1948).

4. Sawyer v. Gilmers, Inc., 189 N.C. 7, 126 S.E. 183 (1925); 53 C.J.S., Libel and Slander § 85 (1948); 33 Am. Jur., Libel and Slander § 197 (1941).

5. 53 C.J.S., Libel and Slander § 85 (1948).

6. Age-Herald Publishing Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921); Murray v. Galbraith, 86 Ark. 50, 109 S.W. 1011 (1908). It may be argued that the cases merely stand for the proposition that a republication made prior to the commencement of an action for an identical libel is not a new cause of action for which a separate suit may be maintained, but that such republication must be joined in the action for the original publication. An analysis of the cases shows that they make no reference to a republication made after an action for the primary publication has already been concluded, or where a suit on the original defamation has been barred by the running of the statute of limitations.

Every republication of the defamatory matter by the author himself constitutes a new cause of action which is separate from, and independent of, the cause of action arising out of the original publication.[7] In *Underwood v. Smith*,[8] the defendant wrote a libelous article, which at his request was published in a newspaper on April 11, 1892. The same article was republished by another newspaper the following day, apparently with the consent of the defendant. The injured party sued the defendant for the publication in the first paper and recovered judgment. Thereafter the plaintiff brought another action against the same party for the later republication in the second paper. The court, on appeal, overruled the defendant's plea of res judicata stating: "Every separate and distinct publication of a libel is a distinct offense, for which a separate action will lie, and a recovery of damages for the first publication of the libel is no bar to an action based upon its repetition or republication."[9]

No distinction is made between the legal effect of a republication by the author himself and a republication by a third party which was the natural and probable consequence of the author's act. In respect to both, the prevailing view is that every such republication gives a cause of action which is separate and distinct from the cause of action arising out of the original publication.[10] In *Union Associated Press v. Heath*,[11] the Associated Press had distributed a certain libelous article to various newspapers. The court held that the Associated Press would be liable for the original publication of the article by sending it to the newspapers, and also for any republication of the libel by the newspapers, and that liability of the Associated Press for the republication was entirely distinct from that incurred for the original publication of the libel.

There is little justification for distinguishing between a republication by the author himself and a republication which, though by another, is the natural

7. 53 C.J.S., Libel and Slander § 84 (1948). And it would appear that the pendency of an action for the original publication is no defense to an action for the republication of the defamation. McKay v. Foster, 179 App. Div. 303, 166 N.Y. Supp. 331 (4th Dep't 1917).

8. 93 Tenn. 687, 27 S.W. 1008 (1894).

9. Id. at 688, 27 S.W. at 1009.

10. Jean v. Hennessy, 69 Iowa 373, 28 N.W. 645 (1886); Jennings v. Southern Ry., 156 S.C. 92, 152 S.E. 821 (1930); Irvine v. Barrett, 119 Va. 587, 89 S.E. 904 (1916). The federal rule is in accord with the weight of authority. Spriggs v. Associated Press, 55 F. Supp. 385 (D. Wyo. 1944); Johnson v. Great Atl. & Pac. Tea Co., 25 F. Supp. 449 (W.D.S.C. 1938). New York has repeatedly held to the same effect. Cook v. Conners, 215 N.Y. 175, 109 N.E. 78 (1915). In Mack, Miller Candle Co. v. MacMillan Co., 239 App. Div. 738, 742, 269 N.Y. Supp. 33, 38-39 (4th Dep't 1934), Justice Edgcomb said: "It might be well to add that we do not think the action is barred by the statute of limitations. . . . Every separate and distinct publication or repetition of defamatory matter is a distinct offense for which an action will lie." In Wolfson v. Syracuse Newspapers, Inc., 279 N.Y. 716, 18 N.E.2d 676 (1939), this was qualified by the single publication rule, which holds that the publication of a libelous statement in a single issue of a magazine or newspaper, although such publication consists of thousands of copies, is one publication giving rise to one cause of action and that the statute of limitations runs from the date of that publication. This single publication rule was subsequently extended to include books in Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119, 81 N.E.2d 45 (1948).

11. 49 App. Div. 247, 63 N.Y. Supp. 96 (1st Dep't 1900).

and probable result of the author's act. When an author publishes a libel under such circumstances that a repetition of it by a third party will almost surely follow, then such republication by the third party is tantamount to a repetition by the author himself.

In the present case, the dissenting justices contended that the authorities relied on by the majority simply held that the original author of defamatory matter is liable for any injurious consequences of a republication by a third party if such republication is authorized or is the natural and probable result of the original publication, and in an action against the original author founded upon the orginal publication evidence of such republication will be admitted solely on the question of damages.

Here, however, the action was not based upon the original publication. Rather, it was based upon the republication thereof, and the authorities agree that such action is distinct from an action founded upon the original publication. As was pointed out by the court in *Underwood v. Smith,* the two actions may be quite dissimilar. Malice may be involved in one and not the other; one may be privileged and the other not; and most important, the damages resulting from the original publication may substantially differ from those sustained by the republication.

The instant case illustrates this last consideration. Plaintiff suffered little more than nominal damages at the time of the original publication, but sustained extensive injury when the defamatory letter was republished before a promotion board convened to consider his record. Here the real wrong was not committed at the time of the first publication, but upon the republication of the libel. To deny the plaintiff his cause of action for compensatory damages against the original author for the second publication on the ground that the statute of limitations has run against the first publication would result in the deprivation of a remedy against the person who impliedly authorized the republication although the effects of his authorization had caused injury long after the statutory period had run. Although the plaintiff might always have resort against the republisher, the latter's repetition may have been privileged, or other defences may keep him immune from suit. In either event the author should be held to account for a republication which was the natural and probable result of his act.

Mechanic's Lien — Statutory Trust for Benefit of Materialmen Where Improved Property Is Outside State.—Plaintiffs, materialmen, furnished materials to a subcontractor for the improvement of real property located in Pennsylvania. As partial payment for the improvement, the subcontractor received a sum of money which it in turn paid over to the defendant, its factor, in New York. Plaintiffs sought to compel the factor to account for these funds allegedly impressed with a statutory trust for their benefit. The appellate division reversed the special term order and granted the defendant's motion to dismiss on jurisdictional grounds. On appeal, the New York Court of Appeals *held,* two judges dissenting, affirmed. The provisions of the New York Lien Law impressing a trust for the benefit of materialmen on funds received for the

improvement of real property do not apply where the real property is located outside the state. *Allied Thermal Corp. v. James Talcott, Inc.*, 3 N.Y.2d 302, 144 N.E.2d 66 (1957).

Section 36-b of the New York Lien Law impresses, for the benefit of laborers and materialmen, a statutory trust on funds received by a subcontractor for the improvement of real property.[1] *People v. Levitt* held that section 36-b does not deprive the subcontractor of his property without due process of law, and is therefore constitutional.[2] Diversion of funds by a subcontractor in violation of this section originally subjected him to penal sanctions only.[3] Now, however, the trust can be enforced ". . . by any person entitled to share in the trust fund in a representative action brought for the benefit of all persons entitled to share in the fund."[4] To succeed in this civil action, a materialman has the burden of proving that there was a diversion of the trust funds at a time when there were existing claims, that his claim is due and unpaid, and that the transferee was not an innocent purchaser for value.[5] This trust fund remedy, while affording materialmen an added degree of protection, does not purport to be exclusive. The plaintiff can still proceed to foreclose any lien he may have or take any other action which would enable him to recover a money judgment for the amount due him.[6]

Although set forth within the general framework of the Lien Law, this statutory trust is not a true mechanic's lien. Even though the purpose of both is to provide protection for those whose services and materials enhance the value of real property, a mechanic's lien attaches to the land and the buildings erected on it,[7] giving materialmen an interest in that property to the extent of the value of the materials supplied,[8] while the statutory trust is impressed upon the fund paid to the subcontractor for the improvement of real property, and not upon the realty itself. By its very nature, a mechanic's lien is restricted to real property within the state, because one state has no power to place an incumbrance on property within the jurisdiction of another state. However, the legislature does have the power to impress a trust upon funds paid and diverted in this state regardless of where the realty is located.[9]

1. N.Y. Lien Law § 36-b. "The funds received by a subcontractor from an owner or contractor or subcontractor for the improvement of real property are hereby declared to constitute trust funds in the hands of such subcontractor to be applied first to the payment of the claims of the subcontractors, laborers and materialmen, arising out of the improvement. . . ."

2. 145 Misc. 621, 622, 260 N.Y. Supp. 458, 460 (1932).

3. Raymond Concrete Pile Co. v. Federation Bank & Trust Co., 288 N.Y. 452, 462, 43 N.E.2d 486, 491 (1942).

4. N.Y. Lien Law § 71.

5. 26 Fordham L. Rev. 355, 357-58 (1957).

6. N.Y. Lien Law § 76.

7. This is true only in cases of improvements on privately owned property. In public improvements, the lien attaches to the money allocated by the city for that improvement. John Kennedy & Co. v. New York World's Fair, 260 App. Div. 386, 388, 22 N.Y.S.2d 901, 903 (2d Dep't), aff'd, 288 N.Y. 494, 41 N.E.2d 789 (1939).

8. Schaghticoke Powder Co. v. Greenwich & J. Ry., 183 N.Y. 306, 310, 76 N.E. 153, 154 (1905).

9. Mallory Associates Inc. v. Barving Realty Co., 300 N.Y. 297, 90 N.E.2d 468 (1949).

In the present case, the majority held that it was not the intent of the legislature to make the trust fund provisions of the Lien Law applicable in the absence of jurisdiction over the property improved, and that to determine the legislative intent, the section should be read and considered in conjunction with the entire statutory scheme of which it is a part. The court argued that since the lien sections of the article can not apply to real property outside the state, the trust fund section does not apply to such property in the absence of an express declaration to the contrary.

The appellate division had reasoned that since the trust funds and the rights flowing therefrom arise out of and are incident to the improvement, the sole jurisdiction should be in the state where the property is located,[10] and that confusion would abound from any other construction, since other states may protect materialmen by provisions differing from the New York Lien Law. Therefore, the court argued, these remedies should be administered, controlled, and coordinated by the jurisdiction in which the property is located.

The dissent took the position that the language of section 36-b is clear and free from any ambiguity, and that since the legislature did not expressly limit its application to improvements located within the state, the courts should not limit it by judicial construction.[11] When considered in their usual sense, the dissent stated, the words of the section indicate that anyone entitled to share in the fund can enforce the trust regardless of where the real property is situated.[12]

The dissent stressed the point that the court would not be giving extraterritorial effect to the section by allowing recovery. It was reasoned that since the section involved does not purport to confer any rights in the real property itself, the location of the property is not controlling. The fund, paid and diverted in New York, is the subject matter of the trust and since the *res* and the parties to the diversion are before the court, it clearly has jurisdiction.[13]

In *Mallory Associates v. Barving Realty Co.*,[14] it was held that a statutory provision making the deposit of a security for a lease a trust fund was applicable even though the lease was related to realty in another state.[15] The Court of Appeals there stated: "in so holding, we are not giving extraterritorial effect to the statute, but . . . we are permitting it to govern the rights and liabilities of corporations created by New York, under a New York contract, with respect

10. Allied Thermal Corp. v. James Talcott, Inc., 3 A.D.2d 198, 200, 159 N.Y.S.2d 115, 117 (1st Dep't 1957).

11. Mallory Associates v. Barving Realty Co., 300 N.Y. 297, 302, 90 N.E.2d 468, 471 (1949).

12. N.Y. Lien Law § 36-b.

13. Ridgefield Supply Co. v. Rosen, 1 Misc. 2d 675, 147 N.Y.S.2d 337 (Sup. Ct. 1955).

14. 300 N.Y. 297, 90 N.E.2d 468 (1949). The Mallory case involved the interpretation of Real Prop. Law § 233 which states that "whenever money shall be deposited or advanced on a contract for the use or rental of real property as security for the performance of the contract . . . such money . . . shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made. . . ."

15. Id. at 301, 90 N.E.2d at 471.

to a New York subject matter, viz., the security deposit."[16] The decision in the *Mallory* case lends persuasive support to the present dissent. Both cases involved statutes which were designed, not to protect the realty located outside New York, but to protect the fund paid over in New York by changing a debtor-creditor relationship into a trust fund relationship. The basic issues presented to the court in each case were substantially similar, and yet the majority opinion in the principal case neither overruled nor distinguished the *Mallory* case.[17]

Precedent aside, there are indications in the statute itself that the legislature did not intend a limited application. The dissent noted "there are no words of limitation, territorially speaking, in section 36-b. As it reads, it applies to *all* funds received by a subcontractor from an owner, contractor or subcontractor 'for the improvement of real property.' "[18] In addition, the trust may be enforced ". . . by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file, a notice of lien . . .,"[19] an indication that the legislature was considering property in another state where New York materialmen would not have the right to file a notice of lien pursuant to this statute. Finally, the purpose of the section is to protect materialmen by giving them a priority of payment; it should be construed liberally to give effect to that purpose. It is reasonable to assume that the legislature wanted to protect all the materialmen that it has the power to protect, and not just those who supplied materials to improve property located in New York. As a matter of fact, the need for protection is greater when the property is outside the state because in such a situation the materialmen cannot resort to enforcement of the lien given by the New York statute.

Negligence — Sudden Emergency Exception to the Assured Clear Distance Ahead Rule.—Three vehicles, the first of which was driven by the defendant while intoxicated, and the third of which was plaintiff's vehicle, were proceeding west on a four lane highway. The second and third vehicles moved into the "fast" lane in order to pass the first. Defendant, suddenly and without warning, turned to his left in front of the second vehicle, drove onto the left shoulder, turned and drove back across the highway to the right shoulder. To avoid col-

16. Id. at 302, 90 N.E.2d at 471.

17. The court might also have found an analogous case in Irving Trust Co. v. Maryland Cas. Co., 83 F.2d 168 (2d Cir. 1936). There the United States Court of Appeals for the Second Circuit considered the application of N.Y. Stock Corp. Law § 114, and held that it is illegal for officers of a foreign corporation doing business in New York to transfer corporate property located outside the state in violation of a New York statute. The court reasoned that it did not need jurisdiction over the property involved to declare this transfer illegal, because the subject matter of the action was the transfer itself which took place in New York; and the place where an act occurs fixes its jural character. (Id. at 171). The court went on to say that it is no defense to a liability arising out of a consensual transaction that it may have indirect effects on extraterritorial rights.

18. 3 N.Y.2d at 308, 144 N.E.2d at 70 (dissenting opinion).

19. N.Y. Lien Law § 36-b.

lision, the driver of the second car applied his brakes. The plaintiff's driver attempted to stop, lost control, and collided with the rear of the second vehicle. At the trial, judgment was rendered for plaintiff. On appeal to the Supreme Court of Michigan, *held*, one justice concurring separately, three justices dissenting, affirmed. A driver is not as a matter of law contributorily negligent where his inability to stop his vehicle within the assured clear distance ahead is attributable to a sudden emergency. *Sun Oil Co. v. Seamon*, 349 Mich. 387, 84 N.W.2d 840 (1957).

The Michigan statute requires that ". . . no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead."[1] In other words, the operator of a motor vehicle, whether driving by night or day, must at all times be able to stop his car within the distance that discernible objects may be seen ahead of it.[2] Thus, where two vehicles are traveling in the same direction, the driver of the rear one must maintain a speed which will enable him to prevent a rear-end collision in the event the front vehicle stops suddenly.[3] As a result, the assured clear distance ahead can be no greater than to the rear of the preceding vehicle.[4] The statute is invoked with equal force whether the object struck is moving forward or is at rest.[5]

Violation of the statute, resulting in an accident, constitutes negligence as a matter of law.[6] The burden is on the party seeking to escape the legal effect of the statute to prove a state of facts over which he had no control, so that compliance therewith was made impossible.[7] This sudden emergency is the exception to the rule, and may be stated thus: the driver must be able to bring his vehicle to a stop within the clear distance ahead ". . . unless such assured clear distance ahead is suddenly cut down or lessened, without his fault, by the entrance *within* such clear distance ahead and into his path or line of travel of

1. Mich. Comp. Laws § 257.627a (Supp. 1956). The statute is a codification of the Michigan common law. Odell v. Powers, 284 Mich. 201, 205, 278 N.W. 819, 820 (1938). The assured clear distance ahead rule is part of the common law of other states. See Haines v. Carroll, 126 Kan. 403, 267 Pac. 986 (1928); Ruth v. Blomquist, 117 Neb. 444, 220 N.W. 572 (1928); Weston v. Southern Ry., 194 N.C. 210, 139 S.E. 237 (1927); West Constr. Co. v. White, 130 Tenn. 520, 172 S.W. 301 (1914); Lauson v. Town of Fond Du Lac, 141 Wis. 57, 123 N.W. 629 (1909). Four states, Iowa, Ohio, Oklahoma and Pennsylvania, have statutes similar to the Michigan statute.

2. Lindquist v. Thierman, 216 Iowa 170, 248 N.W. 504 (1933); Ruth v. Vroom, 245 Mich. 88, 222 N.W. 155 (1928); Smiley v. Arrow Spring Bed Co., 138 Ohio St. 81, 33 N.E.2d 3 (1941); Whitney v. Douglas, ___ Okla. ___, 307 P.2d 154 (1957); Stark v. Fullerton Trucking Co., 318 Pa. 541, 179 Atl. 84 (1935).

3. Higbee Co. v. Lindemann, 131 Ohio St. 479, 3 N.E.2d 426 (1936); Meek v. Allen, 162 Pa. Super. 495, 498, 58 A.2d 370, 371 (1948).

4. Ter Haar v. Steele, 330 Mich. 167, 172, 47 N.W.2d 65, 68 (1951).

5. Winslow v. Veterans of Foreign Wars Nat'l Home, 328 Mich. 488, 493, 44 N.W.2d 19, 21 (1950).

6. Wosoba v. Kenyon, 215 Iowa 226, 243 N.W. 569 (1932); Alexander v. Yund, 339 Mich. 441, 445, 64 N.W.2d 696, 698 (1954); Morr v. Merkle, 47 Ohio App. 533, 192 N.E. 279 (1932); Griffith v. Weiner, 373 Pa. 184, 95 A.2d 517 (1953).

7. Glasco v. Mendelman, 143 Ohio St. 649, 653, 56 N.E.2d 210, 212 (1944).

some obstruction which renders him unable, in the exercise of ordinary care, to avoid colliding therewith."[8]

Had plaintiff been found contributorily negligent in the instant case, a recovery would have been barred.[9] However, the court applied the sudden emergency exception and found no contributory negligence. The application of the exception to such a set of facts is a questionable one, and is virtually without support by case law.[10] The majority reasoned that "if the emergency exception seems unduly narrow in scope and phrasing, we should re-examine its content as drunken drivers jeopardize the peace and safety of our citizens on the highways of the state."[11]

Justice Kelly, concurring, cited the opinion of the trial judge to the effect that plaintiff did not have reason to anticipate that the negligence of defendant would render his stopping imperative. He found that this lack of reasonable foreseeability justified employment of the exception, arguing that the clear distance ahead is measured only from the time that the driver of the rear vehicle discovers the danger of collision. If he discovers the danger too late, (assuming that he has been reasonably alert) he has not violated the statute. The minority answered that "it would impute nothing short of foolishness to the legislative intent to say that the assured, clear distance ahead statute was not intended to apply when everything ahead of the driver seems safe, but only to apply after and when, due to previous disregard of its provisions, an emergency arises in which compliance with the statute is no longer possible. Under that sort of theory it would follow that the statute need not be heeded under the first situation and cannot be under the second."[12] There is indeed authority for the minority view.[13]

The minority summed up by observing that the intent of the statute is

8. Smiley v. Arrow Spring Bed Co., 138 Ohio St. 81, 88, 33 N.E.2d 3, 7 (1941). (Emphasis added.); accord, Ter Haar v. Steele, 330 Mich. 167, 175, 47 N.W.2d 65, 69 (1951); Stark v. Fullerton Trucking Co., 318 Pa. 541, 179 Atl. 84 (1935).

9. Prosser, Torts § 53 (2d ed. 1955). However, under the rule of comparative negligence, plaintiff's contributory fault is not a bar to recovery, but results only in a division of damages. Ibid. The comparative negligence rule does not prevail in Michigan. Gibbard v. Cursan, 225 Mich. 311, 320, 196 N.W. 398, 401 (1923).

10. The case of Rossien v. Berry, 305 Mich. 693, 9 N.W.2d 895 (1943), would seem to support the majority and concurring views. In that case, there was evidence that plaintiff drove his car into the rear of defendant's vehicle when the latter stopped suddenly. The trial judge refused to hold plaintiff contributorily negligent as a matter of law, and left to the jury the application of the sudden emergency exception. The Supreme Court of Michigan found no error. The case is an anomaly. Since it was decided, it has not been again referred to in a decision of the Michigan Supreme Court.

11. 349 Mich. at 840, 84 N.W.2d at 849.

12. Id. at ___, 84 N.W.2d at 853.

13. Ruth v. Vroom, 245 Mich. 88, 91, 222 N.W. 155, 156 (1928), where the court said, "It is not enough that a driver be able to begin to stop within the range of his vision, or that he use diligence to stop after discerning an object. The rule makes no allowance for delay in action. He must, on peril or legal negligence, so drive that he can and will discover an object, perform the manual acts necessary to stop, and bring the car to a complete halt within such range."

". . . to prohibit travelling at a speed such that when the necessity for stopping first becomes apparent, it is, as here, no longer possible to do so in time to avert a collision." The sudden emergency exception, it stated, should be employed only ". . . when one's assured clear distance ahead has been suddenly shortened by the unlawful and not to be anticipated actions of another. . . ."[14] The sudden emergency exception applies only when the obstruction enters *within* the clear distance ahead.[15] Here defendant's vehicle did not enter *within* the clear distance ahead between plaintiff's vehicle and the rear of the preceding car. Further, the statute requires that the driver of the following car be able to stop within the clear distance ahead if the driver of the preceding car brakes suddenly.[16] Here, plaintiff manifestly was unable to stop before colliding with the preceding vehicle. Moreover, although it may be true that defendant's negligent act was not foreseeable in the exercise of ordinary care, nevertheless, "where two vehicles are travelling in the same direction, the legislature has placed safety foremost and has prescribed a *higher degree of care.*"[17]

If the majority's new interpretation of the sudden emergency exception is to be resorted to only when the party seeking the protection of the assured clear distance ahead statute has been intoxicated and reckless, then there was no need to change the law. In such a case, plaintiff's contributory negligence is no defense to an action based on defendant's recklessness.[18] On the other hand, the concurring opinion carried the majority view to its logical conclusion by substituting for the extraordinary care imposed by the statute, a standard of care based on reasonable foreseeability. Such a rule would of course render the statute superfluous, and would seem to thwart the intention of the legislature to create a "rule of safety" and to prescribe a "higher degree of care."[19]

Process — Service Upon Legal Representative of Deceased Nonresident Motorist.—Plaintiffs, residents of Florida, and decedent, a resident of Kansas, were involved in an automobile accident on a Missouri highway resulting in the death of the decedent. Plaintiffs instituted suit in Missouri and claimed jurisdiction over the defendant, a Kansas-appointed legal representative of the decedent, in accordance with a Missouri statute providing for service upon the legal representative of a deceased nonresident motorist by service upon the Secretary of State. Defendant moved to dismiss. The district court *held,* motion sustained. A state "long-arm service statute," in so far as it provides for service upon foreign legal representatives of deceased nonresident motorist, is

14. 349 Mich. at —, 84 N.W.2d at 853, 854.

15. See note 8 supra.

16. See note 3 supra.

17. Ter Haar v. Steele, 330 Mich. 167, 175, 47 N.W.2d 65, 69 (1951). (Emphasis added.)

18. Gibbard v. Cursan, 225 Mich. 311, 196 N.W. 398 (1923); 3-4 Huddy, Cyclopedia of Automobile Law § 186 (9th ed. 1931); Prosser, Torts § 51 (2d ed. 1955).

19. These expressions of legislative intent are to be found in Ter Haar v. Steele, 330 Mich. 167, 175, 47 N.W.2d 65, 69 (1951). The common-law rule was the same. See Ruth v. Vroom, 245 Mich. 88, 91, 222 N.W. 155, 156 (1928), where the court asserted that the rule ". . . does not raise merely a rebuttable presumption of negligence. It is a rule of safety."

an unconstitutional extension of the state police power. *Brooks v. National Bank*, 152 F. Supp. 36 (W.D. Mo. 1957).

Nonresident motorist service statutes exist in all forty-eight states,[1] and uniformly provide that a nonresident who operates a motor vehicle within a state consents to the appointment of an official of that state as agent for service of process in personal injury or property damage actions resulting from tortious operation of the vehicle, and that process served in this manner shall have the same force and validity as if personally served within the state.[2] Nonresident motorist service statutes have been held constitutional.[3] In order to give the plaintiff a remedy in the event of the nonresident's death, several states have amended their statutes to provide that the operation of a vehicle within a state by a nonresident motorist shall be deemed a consent to service upon his legal representative.[4]

A legal representative has been held to be a creature of the state of his appointment, and may not, in his representative capacity, sue or be sued outside the appointing state.[5] A legal representative is not personally liable for claims against the decedent and may be sued only in his representative capacity,[6] with recovery limited to the assets of the decedent within the jurisdiction.[7] Since there was no property of the decedent's over which the present court could assert authority, it concluded that it lacked any basis for either an in rem or an in personam jurisdiction.[8]

Service under nonresident motorist service statutes, as noted, has been held valid upon the theory that the use of the highway is an irrevocable, implied-in-law consent by the nonresident motorist to designate a state official as his agent to accept service of process.[9] The United States Supreme Court so held

1. Knoop v. Anderson, 71 F. Supp. 832, 836-37 (N.D. Iowa 1947).

2. Annot., 18 A.L.R.2d 544 (1951). To assure due process, the statutes generally provide for sending a copy of the summons and complaint to the defendant by registered mail, return receipt requested.

3. Hess v. Pawloski, 274 U.S. 352 (1927).

4. E.g., Arkansas, Michigan, New York. Annot., 18 A.L.R.2d 544 (1951).

5. Vaughan v. Northup, 40 U.S. (15 Pet.) 1 (1841). The rule barring legal representatives from suit outside the state of their appointment has been rather inflexible. Suits have been permitted against foreign legal representatives when there were assets within the forum's jurisdiction, 34 C.J.S., Executors and Administrators § 1013 (1942). By statute, a foreign legal representative may sue in more than half the states. See 3 Beale, Conflict of Laws § 507.2 (1935).

6. Goodrich, Conflict of Laws § 190 (3d ed. 1949).

7. 34 C.J.S., Executors and Administrators § 1013 (1942).

8. For a similar analysis, see Knoop v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947). An action will not lie against a foreign legal representative because of the impossibility of enforcing a judgment against him. A judgment against a foreign legal representative is payable out of the estate only. It cannot be enforced in the foreign state, for there is no estate there, nor in the state which appointed the legal representative, for that state will refuse to enforce the judgment on the ground that the court was without jurisdiction. See 3 Beale, Conflict of Laws § 512.1 (1935).

9. Hess v. Pawloski, 274 U.S. 352 (1927).

in *Hess v. Pawloski*.[10] In *Leighton v. Roper*,[11] the New York Court of Appeals extended this consent theory to uphold service upon a foreign legal representative under the New York nonresident motorist statute because of the particular need for such service, but conceded that a statute attempting to expose foreign representatives to all types of suits would be invalid.[12]

These courts have adopted a legal fiction because clearly there is no real consent on the part of the motorist. If this be so, what then is the real basis of jurisdiction in the *Hess* and *Leighton* cases? The unspoken implication behind such decisions seems to be that the state where the accident occurs has a sufficient *governmental interest*[13] in protecting and promoting the welfare of its citizens by regulating the use of its highways so as to justify an assertion of extraterritorial jurisdiction over a nonresident motorist. Will the Supreme Court carry this to the point of holding that such governmental interest outweighs the common-law rule that a legal representative is not liable to suit in his representative capacity outside of the state of his appointment? If the Court so holds, a judgment rendered by the foreign court would be entitled to full faith and credit in the appointing state when brought there for enforcement.

Recently, the United States Supreme Court upheld the constitutionality of a California statute which subjected a foreign insurance corporation to suits on an insurance contract entered into with a resident of that state.[14] Plaintiff, a California resident, entered into an insurance contract with defendant insurance corporation after a solicitation through the mails. The defendant employed no agents in California and did not have any offices there. The court held that it was sufficient for purposes of due process that the suit was based upon a contract which had a substantial connection with the state. The *interest* of California in providing an effective means of redress for its residents of claims against their insurer was given primary consideration. The hardships and disadvantages of having to bring suit in a distant state were also given much weight by the Court. The Court appeared to place more importance on the governmental interest involved than the extent of the contacts required to satisfy due process. The decision points up the current liberal trend of the Supreme Court in finding jurisdiction where a sufficient governmental interest appears.

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10. Ibid.

11. 300 N.Y. 434, 91 N.E.2d 876 (1950).

12. Id. at 439-40, 443, 91 N.E.2d at 879, 881; accord, Oviatt v. Garretson, 205 Ark. 792, 171 S.W.2d 287 (1943); Plopa v. DuPre, 327 Mich. 660, 42 N.W.2d 777 (1950); Tarczynski v. Chicago, M. St. P. and Pac. R.R., 261 Wis. 149, 52 N.W.2d 396 (1952).

13. Jurisdiction is based upon contacts between the party and the state of the forum. When there are sufficient contacts, and the state of the forum has a sufficient interest in the matter it may acquire jurisdiction over such party and satisfy the demands of due process. In International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945), the Supreme Court held a foreign corporation, by doing business in the state of the forum, established the necessary contacts and the state's interest in regulating business within its borders was a sufficient basis for jurisdiction over a foreign corporation. See Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 72-73 (1954), for a discussion of governmental interest.

14. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

The instant decision reaches a harsh result. A plaintiff having a tort claim against the deceased nonresident motorist would have to bring the action against the legal representative in the state of his appointment, which could be many miles away. The plaintiff's witnesses would be in the foreign state, but the action would have to be brought in the appointing state; such litigation would obviously be inconvenient and costly. To mitigate the harshness of the existing law, one possible solution, pending a Supreme Court decision, would be the adoption by all states of reciprocal agreements granting jurisdiction to each sister state over legal representatives, when a nonresident motorist statute provides for such service.[15] It is submitted that the problem is of sufficient importance to warrant consideration of a uniform statute designed to accomplish that result.

Unfair Competition — Right To Enjoin Out-of-State Retailers Selling Below Fair-Trade Prices.—Defendant corporation, a wholly owned and closely supervised subsidiary of a New York retail corporation, is a mail order discount house located in the District of Columbia, a non-fair-trade jurisdiction. Two-thirds of its sales are "over the counter." Defendant sold plaintiff's appliances by mail to New York customers below the New York fair-trade prices, pursuant to orders received in the District of Columbia on order forms distributed both by the defendant in the District of Columbia and its parent corporation in New York. The parent corporation also distributed advertising material concerning the defendant's prices directly to its New York customers. The district court granted an injunction. On appeal to the United States Court of Appeals for the Second Circuit, *held,* one judge dissenting, reversed. A state fair-trade statute is unenforceable against a seller located in a non-fair-trade jurisdiction where title to the goods passes in the non-fair-trade jurisdiction. *General Elec. Co. v. Masters Mail Order Co.,* 244 F.2d 681 (2d Cir.), *cert. denied,* 355 U.S. 824 (1957).

"Under the common law, there was complete freedom of resale, and retail price fixing by the wholesaler was unenforceable. . . ."[1] However, the majority of states have enacted fair-trade laws, which permit producers and manufacturers of trade-marked merchandise, which is in fair and open competition with commodities of the same general class, to enter into contracts with wholesale and retail distributors, specifying the minimum prices below which such goods may not be resold.[2] These contracts are binding, not only on the contracting parties, but also on all other retailers or wholesalers who sell the manufacturer's trade-marked merchandise with notice of the fair-trade contract.[3] A person who willfully and knowingly advertises, offers for sale or sells any commodity at

15. Knoop v. Anderson, 71 F. Supp. 832, 851-52 (N.D. Iowa 1947).

1. Eastman Kodak Co. v. Siegel, 207 Misc. 283, 288, 136 N.Y.S.2d 800, 804 (Sup. Ct. 1955).

2. See N.Y. Gen. Bus. Law § 369-a.

3. Seagram-Distillers Corp. v. Seyopp Corp., 2 N.Y.S.2d 550 (Sup. Ct. 1938).

less than the fair-trade price stipulated in the contract, is guilty of unfair competition and therefore liable to any person damaged thereby.[4]

Originally fair-trade laws were applicable only to intrastate trade. In 1937, the Sherman Act was amended so as to provide that nothing therein contained should render illegal contracts or agreements prescribing minimum prices of trade-marked commodities, when contracts or agreements of that description were lawful under any statute in effect in any state in which such resale was to be made, or to which the commodity was to be transported for such resale.[5] In 1952 Congress enacted the McGuire Act,[6] which permitted the non-signer provisions of the state fair-trade statutes ". . . to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."[7]

Chief Judge Clark, writing the opinion for the court, underscored the reference in the McGuire Act to fair-trade contracts which are lawful in states "in which such *resale* is to be made."[8] He concluded from the use of the word *resale* that the act was intended to govern only such resales as were made in jurisdictions having fair-trade laws and that a contract made in a fair-trade state, but governing a resale in a non-fair-trade state, would not be within its purview. The manufacturer, therefore, would have no remedy unless the resale occurred in a fair-trade state.[9] It was Judge Clark's view that the place of resale should be determined by the place where title passed according to the law of sales.[10] Since the fair-trade state customers purchasing goods from the defendant corporation knew of the advantages of title passing in the free-trade District of Columbia, where such discounts were legal, the court held that the law of the fair-trade state could not be presumed to apply.

Judge Waterman, concurring, rejected the "title test" and proposed that the situs of the retailer should determine which state law should apply. He pointed out that, prior to the McGuire Act, Congressman Cole of Kansas offered an amendment to protect retailers in fair-trade areas from cut-rate retailers in non-fair-trade areas.[11] This amendment was rejected. Judge Waterman reasoned

4. See N.Y. Gen. Bus. Law § 369-b.

5. 15 U.S.C.A. § 1 (1956 Supp.), often referred to as the Miller-Tydings Act. This act, which amends § 1 of the Sherman Act, has been incorporated into and added as a proviso to the first sentence of that section.

6. 15 U.S.C.A. § 45(a) (1956 Supp.).

7. 15 U.S.C.A. § 45 note (1956 Supp.).

8. "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices . . . when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute . . . in effect in any State . . . in which such resale is to be made . . . ." 15 U.S.C.A. § 45(a)(2) (1956 Supp.).

9. See also Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 140 F. Supp. 165 (D. Md. 1956), aff'd, 240 F.2d 684 (4th Cir. 1957).

10. Uniform Sales Act § 19.

11. Representative Cole's amendment provided in part that "whenever by contract or agreement described in subsection (2) a . . . minimum resale price may be established for a commodity in any State . . . where such a contract or agreement is lawful, it shall be an act of unfair competition, actionable at the suit of any person damaged thereby, to will-

that the absence of the proposed phrase, ". . . *deliver pursuant to a sale, or otherwise deliver*" in a fair-trade jurisdiction, showed that the intention of Congress was that a retailer should be governed by the law of the jurisdiction in which he is located. But from the rejection of this amendment, one could reason just as strongly that Congress intended that the law of the place of the passage of title be controlling.

In *Sunbeam Corp. v. Wentling*,[12] decided before the passage of the McGuire Act, it was held that the Pennsylvania Fair Trade Act[13] did not apply to sales by Pennsylvania non-signing retailers to consumers in other states, or to advertisements published in other states. The concurring opinion concluded that "when Congress created the McGuire Act, it indicated that one of its express purposes was to 'overrule' the Wentling decision, and to permit the individual states to apply their fair-trade laws to interstate shipments such as those involved in Wentling."[14] However, the McGuire Act only added to the existing law an additional provision excluding the state non-signer provisions from the sanctions of the antitrust laws.[15] The defendant in the *Wentling* case was a non-signer. Statutory exceptions to the antitrust laws have always been strictly construed.[16] By construing the McGuire Act strictly one finds that it overrules the *Wentling* case only in as much as it permits non-signer provisions to apply to interstate commerce. This does not lend support to the retailer-situs construction put forth by Judge Waterman.

Judge Lumbard, in his dissent, was of the opinion that for all practical purposes the District of Columbia corporation was merely an out-of-state warehouse and office for the New York parent corporation, and that the sales complained of took place in New York which could prohibit them. Because of the supervision and control by the parent and the New York contacts which the defendant corporation enjoyed, the dissent would disregard the situs of the District subsidiary. This reasoning would ignore the fact that the defendant was separately incorporated and did most of its business in across the counter sales.

Assuming title to the merchandise passed in the District of Columbia, could the defendant corporation be enjoined from making offers or advertising in New

fully and knowingly, in interstate commerce (1) sell or (2) have transported for sale or resale or (3) deliver pursuant to a sale, or otherwise deliver, such commodity in any State . . . where such a contract or agreement is lawful, at less than the price or prices so established in such contract or agreement." 98 Cong. Rec. 4952 (1952).

12. 185 F.2d 903 (3d Cir. 1950).

13. Pa. Stat. Ann. tit. 73, §§ 7-8 (1953).

14. 244 F.2d at 689.

15. "Nothing contained in this section . . . shall render unlawful the exercise . . . of any right or right of action created by any statute . . . in effect in any State . . . which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby." 15 U.S.C.A. § 45(a)(3) (1956 Supp.).

16. Schwegmann Bros. v. Calvert Distillers Corp., 184 F.2d 11, 16 (5th Cir. 1950) (dissenting opinion).

York? This was the second problem. Judge Clark stated that "the critical question is still the place of resale, and no enforcement action may be brought for advertising or offering goods for sale below the fair-trade prices unless the ad or offer contemplated resales in a fair-trade jurisdiction."[17] In the instant case it was contemplated that the resales were to take place in the District of Columbia, so no enforcement action would lie against the defendant corporation for making offers or advertising in New York.

If the McGuire Act makes the law of the place of resale the applicable law,[18] then the law of the place where the advertisement is published or where the offer is made becomes immaterial. Under Judge Clark's appraisal this is what the McGuire Act prescribes and all questions are to be resolved by the "title test."

Under this theory, it follows that even a New York retailer need not abide by the New York law where the sale was to an out-of-state consumer, and the parties intended that title would pass in the consumer's state. In the past Congress has rushed to the aid of fair-trade laws when they were restricted by judicial opinions.[19] The rejection of the Cole Amendment, however, which would have allowed the states to control such mail-order sales, indicates that further help may not be forthcoming. If the volume of business of out-of-state mail houses, operating unhampered by fair-trade laws, increases to the point of jeopardizing domestic retailers who are restricted by fair-trade laws, it might well be that this case is a marker on the way to the effective abolition of fair-trade laws.

Vendor and Purchaser — Right of Purchaser to Proceeds of Vendor's Insurance on Real Property.—Plaintiff, purchaser under a contract to buy realty, took possession of the premises, and as provided in the contract, paid the premiums on fire insurance issued in the vendor's name. Before transfer of title, a fire materially destroyed the premises and the vendor was indemnified by the insurer. Plaintiff brought an action for specific performance of the contract, and to have the insurance proceeds applied in reduction of the purchase price. Judgment for plaintiff was unanimously affirmed by the appellate division. On appeal to the New York Court of Appeals, *held,* three judges dissenting, affirmed. Where a land purchase contract requires a purchaser to pay the vendor's fire insurance premiums, and purchaser bears the risk of loss, the purchaser is entitled to have the proceeds of the insurance applied in reduction of the purchase price. *Raplee v. Piper,* 3 N.Y.2d 179, 143 N.E.2d 919 (1957).

17. 244 F.2d at 684-85. See also Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 240 F.2d 684, 687-88 (4th Cir. 1957), where Judge Soper stated that ". . . the advertisement must relate to a sale of goods within the State in order to fall within the condemnation of the statute . . . . [T]he prohibited acts are listed in a single phrase as 'advertising, offering for sale or selling any commodity,' and since the prohibition against selling is of necessity confined to Maryland sales, the associated acts of advertising or offering for sale must likewise be concerned with sales within the State."

18. See note 9 supra.

19. See Sunbeam Corp. v. Wentling, 185 F.2d 903 (3d Cir. 1950), and the subsequent enactment of the McGuire Act.

At common law, unless otherwise expressly provided, an executory contract to buy and sell real property placed the risk of loss immediately upon the purchaser.[1] Under the Uniform Vendor-Purchaser Risk Act, risk of loss remains in the seller until the buyer acquires either legal title or possession, and the contract of sale is enforceable against the buyer after he assumes the risk of loss even though the property has been materially destroyed.[2]

A vendor retaining legal title or possession pending payment of the purchase price is deemed to have an insurable interest in the realty.[3] Where the vendor bears the risk of loss, and he, at his own expense and for his own protection, has insured the property, he alone is entitled to the proceeds of such insurance.[4] By the contract to sell, a purchaser becomes the equitable owner of the property, and, whether or not he takes possession of the premises, is deemed to hold an insurable interest therein.[5] Accordingly, where the vendee, for his own interest and protection, has insured the property, he also may retain the insurance proceeds.[6]

Where the risk of loss is on the vendee, but the vendor secures a policy of insurance in his own name and at his own expense, most jurisdictions hold that the insurance payment received by the vendor is to be applied to a reduction of the purchase price.[7] In *Brownell v. Board of Educ.*,[8] the vendor expressly assumed the risk of loss and maintained fire insurance at his own expense. The New York Court of Appeals adopted the strict English rule of *Rayner v. Preston*,[9] and held that insurance is a mere personal contract of indemnity to protect the interests of the insured and that it does not run with the land. Since the vendee had an insurable interest, he could, the court said, have protected it

1. Reife v. Osmers, 252 N.Y. 320, 169 N.E. 399 (1929); Sewell v. Underhill, 197 N.Y. 168, 90 N.E. 430 (1910).

2. N.Y. Real Prop. Law § 240-a 1(b), enacted in 1936. Adopted by California, Michigan, Oregon, South Dakota, Wisconsin and Hawaii.

3. Wood v. North Western Ins. Co., 46 N.Y. 421 (1871).

4. Phinizy v. Guernsey, 111 Ga. 346, 36 S.E. 796 (1900); Brownell v. Board of Educ., 239 N.Y. 369, 146 N.E. 630 (1925).

5. Brooks v. Erie Fire Ins. Co., 76 App. Div. 275, 78 N.Y. Supp. 748 (1902), aff'd, 177 N.Y. 572, 69 N.E. 1120 (1904).

6. Trumbull v. Bombard, 171 App. Div. 700, 157 N.Y. Supp. 794 (3d Dep't 1916).

7. In a New Jersey case plaintiff and defendant entered into a contract to buy and sell certain realty insured by the vendor in his own name. The court held that the vendee became the equitable owner and that the vendor, retaining legal title as security for the balance due, became the trustee holding the insurance proceeds for the vendee as representative of the property destroyed. Millville Aerie v. Weatherby, 82 N.J. Eq. 455, 88 Atl. 847 (Ch. 1913). See also Williams v. Lilley, 67 Conn. 50, 34 Atl. 765 (1895); Brakhage v. Tracy, 13 S.D. 343, 83 N.W. 363 (1900); Annot., 37 A.L.R. 1324 (1925); 8 Couch, Cyclopedia of Insurance § 1937 (1931). Contra, a few jurisdictions hold that even where the vendee bears the risk of loss, the vendor, who has maintained his own insurance on the property, is entitled to the proceeds thereof. King v. Preston, 11 La. Ann. 95 (1856); Rayner v. Preston, 18 Ch. D. 1 (1881), overruled by statute, Law of Property Act, 1925, 15 Geo. 5, c. 20, § 47.

8. 239 N.Y. 369, 146 N.E. 630 (1925).

9. 18 Ch. D. 1 (1881), overruled by statute, Law of Property Act, 1925, 15 Geo. 5, c. 20, § 47.

by obtaining his own insurance. The court rejected the theory that the vendor held the proceeds in trust for the vendee, and said that the purchaser was not entitled to the proceeds of the vendor's policy because it was not a part of the *res* bargained for. However, under the *Brownell* decision, the vendee would not be liable on the contract because he could assert the defense of impossibility of performance. The insurer would indemnify the vendor for the loss sustained and the parties would be in substantially their original position.

It is common to find, as in *Rayner v. Preston,* the risk of loss on the purchaser and insurance maintained by the vendor in his own name. Because the court in *Brownell* unqualifiedly adopted the rule of the *Rayner* case, that insurance is always a mere personal contract, and made no reference to where the risk of loss lay, it may be inferred that the court intended that rule to apply in New York even where the vendee bears the risk of loss. In such a situation the vendor can enforce the contract and obtain the purchase price.[10] Nevertheless, this does not entitle him to double compensation. The courts following the *Brownell* rule hold that if the seller receives the full purchase price, he suffers no loss and therefore is entitled to no indemnity. In the event that the insurer has already paid the proceeds, it has a right of subrogation against the vendee.[11] This New York position differs from that in the majority of jurisdictions, which in such a case hold the insurer liable to the vendor on the policy, and the vendor in turn holds the indemnity in trust for the purchaser.[12]

The instant case presents a third situation. The majority of the Court of Appeals here distinguished the *Brownell* case on the ground that the vendee in the present case was bound by the terms of the contract to pay for the insurance, while the vendor in *Brownell* insured himself at his own cost. Clearly in that case, the court argued, the insurance was not a part of the *res* bargained for. The court pointed out that whether the insurance proceeds in the present case were held by the vendor as trustee for the purchaser or in some other way, ". . . the simple analysis of the situation is that the insurance was taken out at the cost of the vendee in the name of the vendor for the protection of the contract and of both parties to the contract."[13]

The dissent noted that the *Brownell* court had considered both the trust and mutual protection theories advanced by the instant court, and had stated: "These reasons may savor of layman's ideas of equity, but they are not law. . . . Insurance is a mere personal contract to pay a sum of money by way of indemnity to protect the interest of the insured."[14] From this language the dissent concluded that the *Brownell* rule should apply to the present facts.[15]

10. N.Y. Real Prop. Law § 240-a.

11. Castellain v. Preston, 11 Q.B.D. 380 (1883) which allowed the insurer subrogation in Rayner v. Preston. See also Fort v. Globe & Rutgers Fire Ins. Co., 186 App. Div. 185, 186, 173 N.Y. Supp. 595, 596 (3d Dep't) (dictum), appeal dismissed, 227 N.Y. 581, 125 N.E. 918 (1919); Aetna Fire Ins. Co. v. Tyler, 16 Wend. 385, 386 (Ct. for Corr. of Err. 1836) (dictum); Larner v. Commercial Union Assurance Co., 127 Misc. 1, 215 N.Y. Supp. 151 (Sup. Ct. 1926).

12. See note 7 supra.

13. 3 N.Y.2d at 181, 143 N.E.2d at 920.

14. 239 N.Y. at 374, 146 N.E. at 632.

15. See also Reife v. Osmers, 252 N.Y. 320, 324, 169 N.E. 399, 400 (1929) (dictum);

The present court did not expressly overrule the *Brownell* decision, but its holding raises the question of whether the two cases are reconcilable. It might reasonably be argued that the vendee's agreement to pay the insurance premiums was merely a part of the consideration bargained for by the vendor, and was not intended to benefit the vendee. Under this reasoning, the court in the present case would clearly be in conflict with the language of the *Brownell* decision. On the other hand, the stipulation for payment of the premiums can reasonably be interpreted as an expression of intent of the parties that the person bearing the risk of loss should be protected pending the actual closing of title. It then seems proper to say that such provision should be given that effect and thus take the case out of the rule set down in the *Brownell* decision. It was upon this latter view that the majority of the court based its reasoning, in effect making the agreement concerning the payment of premiums equivalent to an assignment of the insurance policy.[16]

In the absence of any provision concerning insurance in a contract to sell real property, it is still the rule in New York that insurance is a personal contract. However, the present decision indicates that the courts might be liberal in construing agreements concerning the payment of premiums so as to take a case out of the general rule.

Witnesses — Admissions of Adultery as Confidential Communications Between Husband and Wife.—Plaintiff wife, alleging abandonment, brought an action for separation. Defendant husband interposed an affirmative defense that the wife's cruelty induced and justified his leaving. Defendant testified, over objection, that plaintiff informed him that she had had illicit relations a number of times with another man; that they thought they would elope and go away together; that plaintiff wife moved the defendant's bed out of what was previously their bedroom and lived apart from him; and that he left his wife immediately after this. The appellate division affirmed, by a divided court, the judgment of the supreme court admitting the above testimony and dismissing the complaint. On appeal to the New York Court of Appeals, *held*, two judges dissenting, affirmed. Admissions of adultery made by one spouse to another and aimed at destroying the marital relation are not confidential communications. *Poppe v. Poppe*, 3 N.Y.2d 312, 144 N.E.2d 72 (1957).

At common law a husband or wife was absolutely incompetent to testify when his or her spouse was a party to an action or interested in its outcome.[1] This general disqualification[2] has been removed by statute in most jurisdictions,[3]

Cowan v. Sutherland, 6 Misc. 2d 71, 117 N.Y.S.2d 365 (Sup. Ct. 1952) (dictum); 1936 N.Y. Law Revision Comm'n Report 767, 776.

16. In the Matter of Pastore's Estate, 155 Misc. 247, 279 N.Y. Supp. 200 (Surr. Ct. 1935); O'Brien v. Prescott Ins. Co., 11 N.Y. Supp. 125 (Sup. Ct. 1890).

1. McCormick, Evidence § 82 (1954); 8 Wigmore, Evidence § 2227 (3d ed. 1940).

2. See, e.g., note 5 infra, where spouses are not competent to testify to actions founded on adultery.

3. For a complete and current listing of all statutes see, 2 Wigmore, Evidence § 488 (3d ed. 1940).

and the privilege from disclosure is now limited to confidential communications.[4] In New York either spouse is now fully qualified by statute to testify against the other as to any matters not involving confidential communications, except in an action founded upon an allegation of adultery.[5]

The issue in the present action was what constitutes a confidential communication within the meaning of the New York statute.[6] It is well settled that to be privileged the communication must have been made during a valid marriage; and that a communication, made when the spouses are planning a divorce or made after a separation or divorce, cannot be privileged.[7] However, those communications which were confidential when made remain privileged after the marital status is terminated by death or divorce.[8] Conversations made knowingly in the presence of a third party are presumed not to be confidential and all present may testify,[9] but where a third party eavesdrops, only he may testify.[10] Letters,[11] as well as the observance of acts,[12] may also come within the protection of the statute. Each communication must be taken in conjunction with the surrounding factual circumstances. For example, where the communi-

4. The privilege varies with the terms of each statute and the various interpretations by the courts. Many states have provisions that "any communication" between spouses will be privileged. See, e.g., Cal. Code Civ. Proc. § 1881 (Deering 1949). Other states construe general terms, e.g., "any communication," "private communications," as applying only to confidential communications. See, e.g., Sexton v. Sexton, 129 Iowa 487, 105 N.W. 314 (1905). A third class of states have express provisions for protection of "confidential communications" only. See, e.g., N.Y. Civ. Prac. Act § 349.

5. N.Y. Civ. Prac. Act § 349 provides: "A husband or wife is not competent to testify against the other, upon the trial of an action . . . founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery . . . . A husband or wife shall not be compelled, or without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage." A similar provision, Pen. Law § 2445, provides that "the husband or wife of a person . . . accused of a crime is in all cases a competent witness . . . but neither husband nor wife can be compelled to disclose a confidential communication made . . . during marriage." A spouse may, however, testify to his own adultery; Rivett v. Rivett, 270 App. Div. 878, 61 N.Y.S.2d 7 (1st Dep't 1946). For other exceptions to the statute, see Richardson, Evidence § 458 (8th ed. 1955).

6. Since this action is not founded upon an allegation of adultery the sole question is whether the defendant's testimony was a confidential communication as used in the final sentence of § 349. See note 5 supra.

7. Yoder v. United States, 80 F.2d 665 (10th Cir. 1935); Symington v. Symington, 215 App. Div. 553, 214 N.Y. Supp. 307 (1st Dept. 1926); Spearman v. State, 68 Tex. Crim. 449, 152 S.W. 915 (1913).

8. Hopkins v. Grimshaw, 165 U.S. 342 (1897); 8 Wigmore, Evidence § 2341 (3d ed. 1940).

9. People v. Lewis, 62 Hun 622, 16 N.Y. Supp. 881 (N.Y. Sup. Ct., Gen. T. 1891), aff'd, 136 N.Y. 633, 32 N.E. 1014 (1892).

10. Commonwealth v. Griffin, 110 Mass. 181 (1872); State v. Wilkens, 72 Ore. 77, 142 Pac. 589 (1914).

11. Stillman v. Stillman, 115 Misc. 106, 187 N.Y. Supp. 383 (Sup. Ct. 1921).

12. Smith v. State, 198 Ind. 156, 152 N.E. 803 (1926); People v. Daghita, 299 N.Y. 194, 86 N.E.2d 172 (1949).

cations involved ordinary matters of business,[13] a threat to kill someone,[14] or a dying husband's declaration that he did not commit suicide,[15] the courts have found the confidential element to be lacking.

The present court stated that a single, all embracing definition would be impossible to formulate since it is necessary to consider the character of the communication as well as the relationship of the parties on each occasion. It argued that the legislature never intended to prevent a persecuted spouse from testifying to ill treatment. The court's criterion for admissibility is made to depend upon whether or not the communication constitutes cruel and inhuman treatment detrimental to the marital relation. The admission in the instant case was not that of a penitent spouse asking forgiveness, but, on the contrary, that of an unfaithful wife threatening to persist in her misconduct. In the court's view, it was therefore necessary to consider the subjective intent of the declarant as well as the communication itself.

The cases cited by the majority support this reasoning. In *Fowler v. Fowler*,[16] the husband told his wife, on their second night of marriage, that he did not love her. He also made false admissions of adultery. The court held these communications to be acts of cruelty and not privileged. In *de Meli v. de Meli*[17] unfounded charges of immorality and abusive language were held to be admissible to prove cruelty. In *Yax v. Yax*,[18] conversations between husband and wife regarding the wife's adultery were held to be confidential. However, in that case, the husband promised to make the wife a joint tenant in real estate if she would refrain from further adultery, and the present court distinguished it as a conversation clearly tending to rescue rather than destroy the marital relation.

The dissent in the present case interpreted the testimony as an example of a privileged communication protected by the statute. The dissent cited *Warner v. Press Publishing Co.*,[19] an action based on an allegedly libelous publication. That court refused to admit testimony as to a conversation between the plaintiff and her husband which might have led to an inference that plaintiff had illicit relations with another man. However, this conversation was neither offered to establish cruelty, nor was it shown to be anything but confidential. In *Parkhurst v. Berdell*,[20] also relied upon by the dissent, the court stated that only those

13. Parkhurst v. Berdell, 110 N.Y. 386, 18 N.E. 123 (1888). But see, Mitchell v. Mitchell, 80 Tex. 101, 15 S.W. 705 (1891), where letters, by a husband to his wife, tending to show that their business was unprofitable, were inadmissible.

14. People v. McCormack, 278 App. Div. 191, 104 N.Y.S.2d 139 (1st Dep't 1951), aff'd, 303 N.Y. 782, 103 N.E.2d 895 (1952).

15. New York Life Ins. Co. v. Mason, 272 Fed. 28 (9th Cir. 1921).

16. 58 Hun 601, 11 N.Y. Supp. 419 (N.Y. Sup. Ct., Gen. T. 1890). See also Lanyon's Detective Agency v. Cochrane, 240 N.Y. 274, 148 N.E. 520 (1925), where the court in dictum said that a wife would be allowed to testify that her husband said he was leaving because he loved another woman.

17. 120 N.Y. 485, 24 N.E. 996 (1890); Millspaugh v. Potter, 62 App. Div. 521, 71 N.Y. Supp. 134 (3d Dep't 1901).

18. 125 Misc. 851, 213 N.Y. Supp. 4 (Sup. Ct. 1925).

19. 132 N.Y. 181, 30 N.E. 393 (1892).

20. 110 N.Y. 386, 18 N.E. 123 (1888).

conversations which are induced by the marital relation are confidential. However, that action was brought to compel an accounting by defendant for certain money and securities belonging to the plaintiff. The court held that these conversations were not confidential. Furthermore, the case in no way discussed the issue of cruelty.

It was further argued by the dissent that the distinction made by the majority was too subjective, and that an alienated spouse who is a party in a separation action will be most likely to testify to conversations in such a manner as to make them admissible. However true this may be, it is obvious that if such testimony was *not* false, to disregard it would be to ignore personal wrongs committed by one spouse against the other.

While the majority opinion is reasonable and consistent with previous decisions, should not the legislature go beyond this? As was pointed out in the concurring opinion such testimony should be admissible even if confidential. If not, a spouse maltreated in secrecy could not look to the law for protection.[21] The legislatures and courts of many jurisdictions are not only in accord with this opinion but go even further by permitting spouses to testify to *anything* in a civil action *between* them, or in a criminal action in which one of them is charged with a crime *against* the other.[22] In the Model Code of Evidence[23] a similar proposal is made. The major argument advanced in support of the privilege is that it promotes marital harmony and goodwill.[24] Therefore, the privilege would seem superfluous when spouses oppose each other in civil or criminal actions, since domestic peace is obviously long gone.

21. 3 N.Y.2d at 318, 144 N.E.2d at 76.

22. See, e.g., Cal. Code Civ. Proc. § 1881 (Deering 1949). At common law, exceptions to the privilege were also recognized in the case of certain injuries inflicted on one's spouse.

23. Model Code of Evidence rule 216 (1942).

24. Mercer v. State, 40 Fla. 216, 227, 24 So. 154, 157 (1898); McCormick, Evidence § 88 (1954); 8 Wigmore, Evidence § 2228 (3d ed. 1940).